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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 814

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 36-41; R.R. 7-15) [1] are not yet reported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 5a-12a) is reported at 239 F. 2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1956 (Pet. App. 13a). A petition for rehearing, timely filed, was denied on December 3, 1956 (Pet. App. 13a). The petition for a writ of certiorari

[1] References to "R" are to the Transcript of Record filed in cases Nos. 5279 and 5280 below and references to "RR" are to the Transcript of Record filed in case No. 5380 below.

was filed March 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Power Commission, in granting to petitioner certificates of public convenience and necessity under Sections 7(c) and 7(e) of the Natural Gas Act for sales of natural gas to United Gas Pipe Line Company for resale in interstate commerce, declined to issue certificates of limited duration as requested by petitioner, on the ground that it was without authority to do so under Sections 7(c) and 7(e). The Court of Appeals found that the Commission, contrary to its ruling, had authority under these sections to grant certificates for a limited period, but affirmed the Commission's order on the ground that petitioner had not shown that such certificates should be issued here.

The question presented is whether the Court of Appeals acted properly in affirming the orders of the Commission on grounds other than those relied upon by the Commission, instead of remanding the cases to the Commission for further proceedings not inconsistent with the existence of such authority under Sections 7(c) and 7(e).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth at Pet. App. pp. 1a-4a.

STATEMENT

Petitioner, Sunray Mid-Continent Oil Company, is an independent producer of natural gas which entered into three contracts with United Gas Pipe Line Com-

pany whereby Sunray agreed to sell certain gas to United for resale in interstate commerce. Each of the contracts contained a provision to the effect that it would remain in effect for "a primary term of ten years" from the commencement of service and thereafter for successive periods of one year, subject to termination by either party at the end of the primary term or any succeeding annual period by giving the other party at least ninety days prior written notice (R. 76, 97; RR. 3).

Since sales of natural gas subject to the Commission's jurisdiction may be made, under the Natural Gas Act, only upon obtaining Commission authorization, Sunray filed with the Commission applications for certificates of public convenience and necessity under Section 7(c) of the Act (Pet. App. 1a-2a) for these sales. Each application requested the Commission to authorize the proposed sale

> * * * only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time; * * * (R. 18-19, 26; RR. 5).

After public hearings on the applications (R. 60-65; RR. 4), the Commission, on July 25, 1955 and January 4, 1956, authorized the issuance of certificates of public convenience and necessity to Sunray for the sales of natural gas to United (R. 36-39, RR. 7-13). However, the Commission declined to issue certificates of

limited duration, as proposed by Sunray, on the ground that cessation of service may be authorized only under Section 7(b) of the Act relating to abandonment of service and, since Sunray's applications were filed solely pursuant to Section 7(c), "it is necessary and proper that any certificates granted * * * be without time limitation" (R. 37, RR. 10-11).

On Sunray's petition for review, the Court of Appeals held, contrary to the Commission's ruling, that the Commission has authority under Sections 7(c) and 7(e) to issue certificates of limited duration in proper cases (Pet. App. 9a-10a) and that Section 7(b) does not restrict that authority (Pet. App. 12a). The court then went on to rule that, while in some cases there may be "legal, physical, financial or other factors * * * which warrant" granting certificates for periods of definite duration (Pet. App. 10a), the burden is upon the applicant to show the reasonableness of its request for such a certificate and here Sunray has made no such showing (Pet. App. 10a, 11a). Concluding that "a judgment correct in ultimate effect will not be disturbed on review although the authority below relied upon erroneous reasoning", the court affirmed the orders of the Commission and dismissed the petitions for review (Pet. App. 12a).

DISCUSSION

1. While it originally ruled to the contrary in these proceedings, the Commission has re-examined the pertinent materials and now agrees with the holding below that the Commission has authority under Sections 7(c) and (7(e)) to issue certificates for periods of limited duration, and that this authority is not restricted by Section 7(b). Although Section 7(b)) precludes aban-

donment of service rendered by facilities subject to the Commission's jurisdiction without compliance with the procedures there set out, there is nothing in that Section or its legislative history, or in Sections 7(c) and 7(e) or their legislative history, to require a ruling that Section 7(b) in any way restricts the power of the Commission under Sections 7(c) and 7(e) to issue certificates of limited duration. To the contrary, Section 7(e) authorizes the Commission not only to issue certificates for the "proposed service [or] sale" when required by "the present or future public convenience and necessity", but also to "attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." See Pet. App. 2a-3a. In view of the broad discretion thus vested in the Commission, construing Section 7(e) as authorizing the issuance of certificates of limited duration would appear fully justified.

No conflict with Section 7(b) results from such a reading. Rather, Sections 7(c) and 7(e), when so construed, are harmonious with and complementary to Section 7(b). Thus, Section 7(b) deals with the abandonment of service being provided under a certificate issued earlier, whereas the court's reading of Sections 7(c) and 7(e) permits the Commission initially to issue certificates which authorize service for a limited period of time. Indeed, in the past, the Commission has issued certificates of limited duration in situations where, in the Commission's view, the public convenience and necessity warranted such action. See, *e.g.*, *In the Matter of Louisiana-Nevada Transit Co.*, 2 F.P.C. 546; *In the Matter of Ray Phebus*, 2 F.P.C. 1044; *In the Matter of*

Tennessee Gas and Transmission Co., 4 F.P.C. 293; *In the Matter of Southern Natural Gas Co.*, 8 F.P.C. 688.

2. Having thus laid bare the Commission's misconception of law, the court below exhausted its judicial power. All that there remained for the court to do was to compel correction by remanding the cases to the Commission for appropriate action in light of the governing law. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618-619. The court, however, did not follow this course; instead, it found in the record what it held to be an adequate justification for the Commission's order, even though not relied on by the Commission, and proceeded to affirm the Commission's order as "correct in ultimate effect * * * although [based] upon erroneous reasoning" (Pet. App. 12a).

While such action may be appropriate upon appellate review of a judgment of an inferior court, it is firmly established that, in view of the different relationship between administrative agency and reviewing court, this procedure is not available upon review of an administrative order. This is particularly true where, as here, the contested issue involved policy judgments and factual determinations which, under the Natural Gas Act, were for the Commission to make, at least in the first instance. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194; *Far East Conference* v. *United States*, 342 U.S. 570, 574 and

cases cited *supra*, p. 6. The controlling principles were aptly summarized in the first *Chenery* case (318 U.S. at 87-88):

> * * * The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.
>
> In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering* v. *Gowran*, 302 U.S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot in-

trude upon the domain which Congress has exclusively entrusted to an administrative agency.

It is thus plain that the action by the court below constituted an unwarranted intrusion "into the domain which Congress set aside exclusively for the administrative agency." *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.[2]

CONCLUSION

For the foregoing reasons, it is our view that certiorari should be granted, the judgments below reversed (without further briefs or argument), and the case remanded with instructions to remand the cases to the Commission with appropriate directions.

J. LEE RANKIN,
Solicitor General.

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General Counsel,
Federal Power Commission.

APRIL, 1957.

[2] Since the court's error discussed in the text and presented by petitioner as its second question is fully dispositive of the case, it is unnecessary to reach or discuss the two additional questions presented by the petition.

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JOHN T. FEY, Clerk

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SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM FOR PETITIONER

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MEMORANDUM FOR PETITIONER

In its memorandum to this Court the Federal Power Commission has taken the position that the court below, having laid bare the Commission's error, should have remanded the cases to the Commission for further proceedings in light of the correct view of the law. The Commission, accordingly, has suggested that certiorari should be granted on this ground, the judgments

below reversed (without further briefs and argument) and the case remanded to the court below with instructions to remand the cases to the Commission with appropriate directions. Petitioner agrees that such remand should be directed and that this would be fully dispositive of the case.

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